Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2103

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN BARREN, AN INCOMPETENT, BY HIS GUARDIAN, HENRIETTA BARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Upop.

TABLE OF AUTHORITIES

Page

Cases:

Accardi v. *United States*, 435 F.2d 1239 (3d Cir. 1970) . . . 5

Casias v. *United States*, 532 F.2d 1339 (10th Cir. 1976) 5, 7

Clifford by Clifford v. *United States*, 738 F.2d 977 (8th Cir. 1984) 6, 7

Dundon v. *United States*, 559 F. Supp. 469 (E.D.N.Y. 1983) 7

Simmons v. *United States*, 805 F.2d 1363 (9th Cir. 1986) 7

United States v. *Kubrick*, 444 U.S. 111 (1979) 1, 3, 4, 5, 7, 8

Washington v. *United States*, 769 F.2d 1436 (9th Cir. 1985) 7

Williams v. *United States*, 228 F.2d 129 (4th Cir. 1955), cert. denied, 351 U.S. 986 (1956) 5

Zeidler v. *United States*, 601 F.2d 527 (10th Cir. 1979) . . . 6

Statutes:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 3

Pennsylvania Mental Health Procedures Act of 1976, Pa. Stat. Ann. § 50, § 7114 (Purdon Supp. 1988) 4

Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, § 4603 (Purdon 1969) 4

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2103

JOHN BARREN, AN INCOMPETENT, BY HIS GUARDIAN, HENRIETTA BARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the court of appeals' application of the accrual standard in *United States* v. *Kubrick*, 444 U.S. 111 (1979), to petitioner's medical malpractice claim brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*

1. From January 1972 to February 1974, petitioner received out-patient treatment at the Veterans Administration (VA) hospital in Wilkes-Barre, Pennsylvania, for a skin condition and anxiety (Pet. App. 3c-4c). During that period, the VA doctor diagnosed his anxiety condition as "adjustment reaction of adolescence," and treated him with tranquilizers (*ibid.*). In August 1973, the VA determined that petitioner's mental condition was not service-related and denied his disability claim (*id.* at 4c). After petitioner was denied in-patient psychiatric care at the VA hospital in February 1974, he was voluntarily admitted, at

his sister's expense, for psychiatric hospitalization in non-VA hospitals under a private doctor's care (*ibid.*).

In October 1977, following a substantial deterioration of petitioner's condition, the VA reversed its prior decision, determined that petitioner's mental condition was service related, and awarded him a disability retroactive to February 26, 1973.[1] In September 1979, petitioner and his sister filed medical malpractice claims with the VA. Petitioner sought principally non-economic damages for the aggravation of his pre-existing mental condition. Barren's sister sought reimbursement of medical expenses, including the costs of private hospitalization, incurred on behalf of petitioner. After trial, the district court held that petitioner's sister's claim was barred under *Kubrick* because "[p]laintiffs have offered no evidence, nor can the court educe any evidence from the record, to show why she did not discover or, through the exercise of reasonable diligence, should have discovered, the injury claimed and its cause [prior to 1977]" (Pet. App. 9a).

With respect to petitioner's claim, however, the district court applied a different discovery rule. The district court found that because petitioner's mental condition "affected his ability to understand that * * * the second injury [of aggravation of his mental condition] occurred" (Pet. App. 8a), he could not "through the exercise of reasonable diligence" have discovered his injury before October 1977 (*id.* at 9a). Taking into account the subjective factor of petitioner's mental state in applying the *Kubrick* standard, the court determined that the action was not time-barred, since the statute of limitations could not have commenced to run earlier than two years before the filing on September 7, 1979 of petitioner's administrative action (*ibid.*).

---

[1] The 30% disability awarded on October 30, 1977 was increased to 50% on March 15, 1979, and to 100% on October 18, 1984 (Pet. App. 4c-5c).

After trial, the district court found that the VA "made no meaningful effort to diagnose Barren's condition or to treat it in the proper manner" (Pet. App. 25a), and that the VA doctor failed to provide necessary in-patient hospitalization and standard out-patient care (*id.* at 24a). It entered judgment for petitioner for $1,124,000 (*id.* at 7b). The government appealed.

2. In a divided panel decision, the court of appeals reversed the decision of the district court on the ground that "the [district] court incorrectly applied the legal standard [in *Kubrick*] in assessing the timeliness of plaintiff's claims under section 2401(b), and in effect improperly tolled the statute of limitations" (Pet. App. 11c). Judge Cowen, in his separate opinion,[2] stated that "*Kubrick* makes clear [that the accrual] rule cannot be subjectively applied" (*id.* at 10c). Rather, *Kubrick* mandates application of an *objective* accrual test, to wit: whether the petitioner "possessed the facts such that, as a reasonable person, he should have known of the malpractice" (*id.* at 8c). Judge Cowen explained that (*id.* at 10c (citations omitted)):

> [a]llowing Barren to file later than an objectively reasonable person would be tantamount to ruling that a plaintiff's mental infirmity can extend the statute of limitations. Such extensions have uniformly been rejected by this and other courts of appeals.

Judge Cowen added that petitioner's situation did not involve fraud, continuing treatment by a physician, or the development of a transference relationship by a patient with her doctor, "which might mask the malpractice and excuse the failure to timely file a claim" (*id.* at 8c n.6). Applying the standard of an "objectively reasonable per-

---

[2] Judges Cowen and Sloviter concurred in the judgment, but both wrote separate opinions. Judge Cowen's opinion apparently speaks only for himself.

son," Judge Cowen thus concluded that petitioner's claim accrued well before the October 1977 date identified by the district court (*id.* at 8c-11c).[3]

In a concurring opinion, Judge Sloviter agreed that "[i]nclusion of a plaintiff's mental incapacity as a factor to be considered in determining the reasonableness of plaintiff's diligence runs counter" to the established objective approach (Pet. App. 14c). She concluded (*ibid.*):

> Indeed in this case, the *only* factor that distinguished plaintiff's situation from that of his sister was his mental incapacity. Since that interposes an impermissible subjective element into the reasonable person standard, *see* Restatement (Second) of Torts, §§ 283B, 283C (1964), the district court's reliance on the plaintiff's mental incapacity was legal error.

Judge Becker dissented, stating that he had "no disagreement with Judge Cowen or Judge Sloviter concerning the general rule governing the statute of limitations for malpractice" (Pet. App. 16c). Judge Becker argued that the government's responsibility for Barren's inability to perceive his own mental deterioration justified the application of a "narrow, yet recognized equitable exception to the *Kubrick* general rule" (*id.* at 16c-17c).[4]

---

[3] Judge Cowen pointed in particular to petitioner's decision prior to 1977 to seek treatment outside the VA system and to the district court's finding that petitioner's sister's claim, filed at the same time as petitioner's, was untimely under the *Kubrick* test (Pet. App. 9c).

[4] In addition to the statute of limitations, the government also invoked certain immunity provisions under Pennsylvania mental health statutes as grounds supporting dismissal of this suit. In particular, we argued below that under either the Pennsylvania Mental Health and Mental Retardation Act of 1966 (in effect at the time the VA denied voluntary admission to petitioner), Pa. Stat. Ann. tit. 50, § 4603 (Purdon 1969), or the Mental Health Procedures Act of 1976 (currently in effect), Pa. Stat. Ann. tit. 50, § 7114 (Purdon Supp. 1988), the government is immune from liability for its psychiatrist's negligence

3. The court of appeals' application of the *Kubrick* standard to the facts of this case was correct. It is well established that a plaintiff's mental disability does not justify an exception to the objective "reasonable person" test governing the accrual of claims under the FTCA, and there is no serious question that an "objectively reasonable person" would have filed his malpractice claim, based on events in 1972 and 1973, long before petitioner's 1979 filing.[5] Moreover, petitioner's argument that the Court should recognize an exception to this objective standard for mental disabilities aggravated by government malpractice represents an extremely narrow class of cases not meriting this Court's attention.[6]

It is well settled that "[i]nsanity, such as constitutes a legal disability in most states, does not toll the statute of limitations under the Federal Tort Claims Act." *Casias* v. *United States*, 532 F. 2d 1339, 1342 (10th Cir. 1976) (citing *Accardi* v. *United States*, 435 F. 2d 1239 (3d Cir. 1970), and *Williams* v. *United States*, 228 F. 2d 129 (4th Cir. 1955), cert. denied, 351 U.S. 986 (1956)). Both Judge

---

(Pet. App. 27c-28c). Although the district court denied immunity on this ground, and the majority of the court of appeals panel did not reach the question, Judge Becker's dissent concluded that the earlier enactment may well bar recovery as to the portion of the claim involving failure to admit petitioner for hospitalization (Gov't C.A. Br. 24-28). As Judge Becker pointed out, it is unclear whether any of the damages awarded were attributable to the VA's out-patient care (Pet. App. 28c).

[5] The deterioration of petitioner's mental condition as well as the cause of his decline were manifestly apparent long before October 1977. As Judge Cowen's opinion noted, "the very fact that [petitioner] sought treatment outside the VA [in 1974] is a clear indication that he believed the treatment provided by the VA was unsatisfactory" (Pet. App. 9c).

[6] We are unaware of any other case involving alleged aggravation of a claimant's pre-existing insanity.

Cowen and Judge Sloviter relied on this undisputed principle, which squarely controls the disposition of this case.

Petitioner argues that the government's role in allowing petitioner's mental condition to worsen justifies consideration of plaintiff's condition as one of many factors bearing on the reasonableness of plaintiff's diligence in discovering the fact and cause of his injury.[7] However, the cases cited by petitioner in support of this argument extend the statute of limitations for claimants rendered comatose, lobotomized, or traumatized by a sexual relationship with a therapist (Pet. 5-7), and thus are not in conflict with the rule that mental incompetence does not itself affect the running of the statute of limitations. Judge Sloviter's concurring opinion below recognized, correctly in our view, that the "extraordinary situations" presented in those cases were distinguishable "from a case such as this alleging some lesser level of mental incapacity" (Pet. App. 15c n.2). The very same cases acknowledge this distinction and expressly affirm the continuing vitality of the principle that mental incompetence is not a factor in the determination of the timeliness of an FTCA claim. See *Zeidler* v. *United States*, 601 F. 2d 527, 531 (10th Cir. 1979) ("the insanity rule discussed in *Casias*" does not apply in the case of a lobotomized plaintiff because "brain damage or destruction is not to be classified in the same way as ordinary mental disease or insanity for the purpose of barring * * * an action [under the FTCA]"); *Clifford by Clifford* v. *United States*, 738 F. 2d 977, 980 (8th Cir. 1984) (the court's holding that a cause of action under the FTCA

[7] Petitioner failed to argue in the court of appeals that application of the doctrine of equitable tolling justified the district court's holding (see Pltf.-Appellee's Br. 14). Because the distinct question of equitable tolling was not before the court of appeals, this case is not an appropriate vehicle for this Court's review based on the theory of equity outlined by Judge Becker in dissent.

does not accrue while plaintiff is in coma leaves undisturbed the incompetency rule articulated in *Casias*).[8]

We recognize that it is possible to construe the cases cited by petitioner as at odds with the general principle that the individual's capacity to appreciate his injury has no place in assessing a claim's timeliness under *Kubrick*. However, this potential inconsistency does not warrant this court's review of the instant case. The distinctive facts of those cases make clear that they pose no direct conflict with the decision below. In addition, the absence of any significant number of cases raising the issue presented here indicates no pressing need to resolve the tension in reasoning between the present case and those cited by petitioner.

Petitioner's subjective test, if applied here, would represent a significant departure from the "reasonable person" approach employed in *Kubrick*. Application of petitioner's standard would substantially prolong the limitations period in a number of cases. In addition, petitioner's approach would require a case-by-case determination of the claimant's capacity to appreciate the manifestations of his injury throughout the period prior to filing.

---

[8] See also *Dundon* v. *United States*, 559 F. Supp. 469, 474 (E.D.N.Y. 1983), in which the district court reiterated the *Casias* insanity rule and distinguished coma from mental disability for the purpose of determining when the statute of limitations begins to run; and *Washington* v. *United States*, 769 F.2d 1436, 1438-1439 & n.1 (9th Cir. 1985), in which the court relies on *Clifford* to distinguish coma from mental incompetence for the purpose of applying *Casias*.

Petitioner also cites an FTCA malpractice case in which plaintiff's understanding of her injury was hindered by the psychological effects of her sexual relationship with her physician. See *Simmons* v. *United States*, 805 F.2d 1363 (9th Cir. 1986). The holding of this case is narrowly confined to the situation involving abuse of the transference phenomenon.

The adoption of an accrual standard that allows a plaintiff's mental disorder to be taken into account would invite consideration of a host of factors bearing on the plaintiff's subjective ability to appreciate the facts and cause of his injury. Such an approach would undermine the important goals of administrative regularity and prompt presentation of claims.

This Court recognized in *Kubrick*, 444 U.S. at 125, that statutes of limitations often effect a harsh result by cutting off valid claims. This, however, does not justify a refusal to apply statutes of limitations in an objective and predictable way. Petitioner's invitation to substitute an ad hoc, case-by-case approach should be rejected.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60619